Foreword

Can Originalism Work?

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The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 21st volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended plus a look at the term ahead. We are the first such journal to be released, and the only one that approaches its task from a classical liberal, Madisonian perspective, grounded in the nation's first principles: liberty through constitutionally limited government. We release this volume each year at Cato's annual Constitution Day symposium on September 17th or thereabouts.

After 12 years of working on the *Review* in some capacity—first as an intern who laboriously (and, admittedly, often incorrectly) cite checked hundreds of pages, then a managing editor who kept the trains running on time, and then editor in chief for the last four years—this is the first time I am writing the foreword. I'm taking over from Ilya Shapiro, who edited 11 volumes of the *Review*, and who departed the Cato Institute in early 2022 for what we hope are greener pastures. Before Ilya, Roger Pilon, the man who saved me from a life of quiet desperation in corporate law, penned this foreword. I've turned over the task of writing the introduction to my colleague and the *Review*'s managing editor Tommy Berry, who also began as an intern working in the cite-checking mines. Now I get to write about the interesting theme(s) that emerged in the Court's most recent term.

At some point during every year that I work on the *Review*, I think about how quixotic the project is. "Writing and publishing a law

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review in three months is a crazy undertaking," is a thought that will usually run through my head as I'm editing an article at 3:00 a.m., wondering whether I'm still on track with my deadlines. Only with the able assistance of my interns and colleagues—and of course our (usually) diligent contributors who actually write the articles on very short deadlines—would publishing the *Review* be possible.

While editing the *Review*, it can be easy to miss the forest for the trees and thus hard to find a theme for the term that underlies the decisions. Each article is an in-depth look at an often-monumental case that affects the lives of millions of Americans. Some of those decisions are blockbusters—front-page news—and some fly under the radar but are nonetheless momentous. Those who aren't dedicated Court watchers are often wondering what's going on within the black box of the imposing building at 1 First Street. Are the justices a super-legislature, our life-appointed lords and masters, wielding immense, unelected power?

During a single week in late June 2022, three decisions seemed to confirm to many that the Supreme Court had gone rogue. First, the Court decided that the Second Amendment protects an individual right to carry a firearm outside the home without second-guessing by government bureaucrats. The next day, the Court handed down *Dobbs*, overturning *Roe v. Wade*. Then, before the ink could dry on the jeremiads castigating the Court's audacity, the Court held that the EPA lacked the power to issue sweeping rules intended to counteract climate change.

Guns, abortion, climate change—it was a perfect nightmare for some. Four years of President Donald Trump and three controversial nominations to the Court had produced what many feared: a real-life *Handmaid's Tale* where women are incubators protected by brandished assault weapons while slowly melting from out-of-control climate change.

Originalists—who subscribe to the theory that the Constitution should be interpreted according to the original public meaning of the document's words when they were written and ratified—mostly had a different interpretation. Upholding the right to bear arms was adhering to the explicit words of the Second Amendment, and Constitutions are designed and intended to put some questions outside of the democratic process. Overturning *Roe* was a pro-democracy move, returning the question of abortion to the voters. And limiting the EPA's ability to pass sweeping rules to address

climate change was also a pro-democracy move, ensuring that such "major questions" would be answered by a democratically elected Congress rather than bureaucrats. For originalists—at least in theory—the cases had little to do with whether carrying guns is good, abortion is bad, or climate change is a problem.

Thus, conservatives and (some) libertarians celebrated. Progressives recoiled. Conservatives felt their decades-long project of rescuing the Constitution from exile was finally coming to fruition. Progressives thought the Court had become essentially a right-wing dictator and seriously considered, and are considering, severe actions such as Court packing.

Originalists had hoped for a different reaction. They hoped that a concerted movement to rescue the Constitution and return the Court to its proper role would be seen as a restoration, not a revolution or coup. They hoped that, after the constitutional missteps from, roughly, 1930–1980, a Court that took the Constitution seriously would be seen as more legitimate and worthy of respect. They hoped that people would stop demanding that the Court and the Constitution give them everything they want and be an agent for fundamental social change.[1]

Now, more than ever, it's worth asking whether such hopes were ever realistic. Will the originalist project to rescue the Constitution ever be regarded as legitimate by a majority of the people? Do people want an originalist Constitution? Does it matter what they want?

I'm skeptical that the hopes of originalists were realistic, as I think anyone paying attention should be. Many people, on both the left and right, don't seem to want justices who strive to interpret the Constitution impartially. In the wake of the *Dobbs* decision, some of my progressive friends asked me what I thought. I'm not an expert on the Fourteenth Amendment, so I'm still ruminating on *Dobbs*, but, I told them, it is possible to be anti-*Roe*, pro-choice, and pro-life. They were confused. I explained that it is possible to believe that *Roe* was bad constitutional law, that every state should pass pro-choice legislation, and to be generally against abortion. "How?" they asked. "Well, in the same way I think the federal drug war is unconstitutional,

[1] Some originalists will argue that I'm mischaracterizing their position as overly Pollyannaish, which is fair, but I think many will agree that such hopes were at least in the back of their minds.

every state should legalize all drugs, and you generally shouldn't take heroin," I responded. They were still confused.

For too many, if they like a policy, it's constitutional; if they don't, it's not. That's true for both sides, of course, as conservatives also tend to find in the Constitution—or not find—those things they like. It's hard to imagine how the hopes of originalism can be realized if more people don't realize that the Constitution, whatever it means and however it is interpreted, does not and should not perfectly align with our policy preferences.

During that consequential week in June when many progressives felt that the world was coming down around them, I found myself wishing for more constitutional literacy, as people in my profession so often do. Do people really understand what the Court does, its role in our constitutional republic? Or, for that matter, do they know what the Constitution says, such as, for example, that Congress has limited and enumerated powers? Civic literacy has been in the doldrums for some time, so I'm not optimistic about public knowledge on these questions.[2]

For many people, the Republican-appointed justices issued those fateful opinions for very simple reasons: they love guns, hate abortion, and are skeptical of climate change. I'm not a mind reader, but I'm confident that, in the minds of the Republican-appointed justices, they were doing their jobs as described and ordained by the Constitution. They are charged with interpreting and applying the law, not with making policy decisions. Through ratification, the Constitution and its amendments placed certain questions outside the democratic process, ensuring that populist waves of voter ire could not upset the cherished rights of a liberal democracy, such as the rights of free speech, religion, self-defense, and due process for the accused.

To those justices, policy-based arguments are usually unhelpful and/or irrelevant. Perhaps carrying guns causes social harms that outweigh the benefits, but if the Constitution, properly interpreted, protects the right to carry guns, then the relevant policy decision

[2] I couldn't find polling on these specific questions, but for a discussion of the problem of American civic illiteracy in general, see Judge Don. R. Willett, Flunking the Founding: Civic Illiteracy and the Rule of Law, 2020–2021 Cato Sup. Ct. Rev. 13 (2021).

was made when the amendment was ratified. Until the Constitution is amended, that right is protected despite the social harms.

Some people value certain constitutional rights more than others, and thus the right carries more weight for them against perceived social costs. Gun-rights advocates understand that guns can have large social costs, but they believe the costs are worth the benefits. Similarly, some people place great value on the rights of the accused, which also carry social costs. The right to be free from unreasonable searches and seizures can prevent police from solving crimes and even let accused criminals go free. And the right to freedom of speech allows people to spew hateful rhetoric, to disseminate misinformation, and to flood the airwaves with misleading political ads.

Under one theory of judging, the judge is supposed to ignore such value judgments when interpreting the Constitution. Are misleading political ads bad? Maybe, but the question is whether they are an example of "speech" protected by the First Amendment.[3] Should more power be given to executive agencies to use their expertise to craft specialized regulations? Perhaps, but does the Constitution allow Congress to delegate its legislative power in that way?

Originalism is a theory partially intended to keep value judgments out of judges' reasoning. In the wake of perceived missteps by the Warren and Burger Courts—including *Roe v. Wade*—the first wave of modern originalists believed that the Court had strayed too far from the original meaning of the Constitution. From the massive government programs created by the New Deal and eventually approved by the Supreme Court, to the perceived extra-constitutional expansion of the rights of the accused in cases like *Miranda v. Arizona*, the justices of those eras were thought to be behaving more like a super-legislature than a court—if they liked a law they voted to uphold it, and if not they didn't.

Originalists don't like that theory of judging, and they think something should be done about it. A Supreme Court that doesn't behave like a court is deeply damaging to the country. People keep asking the Court to decide questions that are properly left to the legislature or other political processes. Increasingly, it is a common belief that all Good Things, however defined, can be found in the Constitution.

[3] Political speech protected by the First Amendment still undergoes a balancing test, but even under strict scrutiny, the restrictions usually lose.

The only problem is finding enough justices who understand what the Good Things are and can "find" them in the Constitution.

But originalists are often criticized, with good reason, for masking their own preferences in a theory of "impartial judging." Not coincidentally, it is argued, "impartially" interpreting the Constitution according to the original public meaning often yields results that originalists normatively want. Originalists tend to think that the expansive welfare programs of the New Deal are not just bad ideas but also unconstitutional according to the original public meaning. An originalist interpretation of the religion clauses of the First Amendment does not prohibit crosses on public land nor the funding of religious private schools through a tax-credit system, two things that conservatives generally favor as policies. And, of course, an originalist interpretation of the Fourteenth Amendment, it was claimed (and eventually held), does not contain a right to an abortion. Critics wonder whether it is really a theory of impartial judging that is being articulated or just a convenient way for conservatives to get what they want through "impartial" judging.

To be sure, many self-proclaimed originalists often seem to set aside their theories when it comes to criminal justice issues. In *Gonzales v. Raich*, for example, Justice Antonin Scalia voted to uphold the federal prohibition on cultivating medical marijuana, despite that cultivation being legal under state law. The issue concerned the breadth of Congress's commerce power, something Scalia had recently twice voted to limit. When it came to the drug war, however, it seemed something was different. Did Scalia's presumably anti-marijuana views win out over his vaunted hard-line originalism?

And originalists seem to spend more time complaining about the size of federal programs and cases like *Roe* and *Lawrence v. Texas*, which found a right to same-sex intimacy in the Fourteenth Amendment, than they do about mass incarceration and undercutting the rights of criminal defendants. In 1978, in *Bordenkircher v. Hayes*, the Court upheld essentially unlimited coercion of defendants through plea bargaining, allowing prosecutors to threaten the accused with extreme sentences for having the temerity to ask for a trial. The Framers and ratifiers of the Constitution, who viewed the jury trial as one of the most important safeguards of liberty and protected it with numerous clauses in both the original Constitution and the Bill of Rights, would have a huge problem with *Bordenkircher*. But law-and-order

conservatives who are self-styled originalists seem to rarely bring up criminal justice cases. Can the originalism project work if it is perceived to be half-hearted and selectively applied?

Some conservative legal scholars have decided that originalism is never going to work, and that it was only useful because it met "the political and rhetorical needs of legal conservatives struggling against an overwhelmingly left-liberal legal culture."[4] Those are the words of Harvard law professor Adrian Vermeule, who is probably the most prominent advocate of so-called "common-good constitutionalism." Common-good constitutionalism calls on conservatives to stop pretending that the Constitution should be interpreted impartially, or even that it can be. The "starting point" is to interpret the "majestic generalities and ambiguities of the written Constitution" in light of "substantive moral principles that conduce to the common good." For Vermeule, that means old conservative values centered around family, traditional hierarchies, and "a candid willingness to 'legislate morality.'"

Vermeule's views fit well with the politics of Donald Trump. For many of his supporters, Trump was refreshing because he took off the gloves and went straight to fighting the culture wars. Many on the American right were tired of being "civil" to the left, and Trump was, and is, a hurricane of incivility. Common-good constitutionalism is a theory designed to allow some conservatives to get what they want out of the Constitution by ignoring it. They think that's what progressives did to get what they wanted, and if you can't beat them with purported "impartial" theories of judging, you might as well join them.

But that approach turns a constitutional order into a Hobbesian battle, and it asks judges to be warriors in that battle. For a judge fighting that battle, why even issue a long-winded, citation-heavy written opinion? Just write, "I like this" and be done with it.

Originalism strives for more, as do other theories of impartial judging. And although judgments often don't come from pure impartiality, a liberal constitutional order demands a theory of impartial judging. But will an increasingly partial populace be able to recognize impartial judging when it occurs? On that question, I'm pessimistic.

[4] Adrian Vermeule, Beyond Originalism, The Atlantic (Mar. 31, 2020), https://bit.ly/3QsrNah.